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No. 572

IN THE

SUPREME COURT OF THE UNITED STATES

JENNIE LOUISE DAVIDSON MEADOWS, *Petitioner*

vs.

WESTERN RESERVE LIFE INSURANCE COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

JENNIE LOUISE DAVIDSON MEADOWS, *Petitioner*

vs.

WESTERN RESERVE LIFE INSURANCE COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

To the Honorable, The Supreme Court of the United States:

Jennie Louise Davidson Meadows presents this, her petition for Writ of Certiorari to be directed to the Supreme Court of the State of Texas, to review a judgment of that Court, rendered on October 7th, 1953, (Rehearing denied on November 11, 1953) reversing a judgment of the trial court, the 90th District Court of Young County, Texas, and of the Court of Civil Appeals in and for the Second Supreme Judicial District of Texas (unanimous opinion) in favor of your Petitioner and against the Respondent. Time within which to file Petition for Certiorari expires on February 9, 1954.

I.

SUMMARY AND STATEMENT OF THE MATTER INVOLVED

The Petitioner recovered a judgment in the District Court of Young County, Texas against the Respondent, a Texas corporation, for the sum of $5,000.00, plus statutory penalty, attorneys fee and cost on accidental death benefit riders attached to five polices issued by the Respondent on the life of Benjamin Earle Meadows. (R 9 to 21) On appeal by Respondent to the Court of Civil Appeals, Second Supreme Judicial District, the judgment of the trial court was affirmed *(Western Reserve Life Isurance Company vs. Meadows*, 256 SW (2d) 674.). (R 55 to 71, pertinent part begins at page 62)

Writ of Error was granted Respondent by The Supreme Court of Texas and said Supreme Court on hearing reversed the judgments of the trial court and of the Court of Civil Appeals and rendered judgment in favor of Respondent, holding that the exclusion clause in said riders plead, as a defense, by Respondent "This accidental death benefit shall be void if the insured shall be in the military, naval or allied service, in time of war, at the date of the accident" prevented recovery, stating "It is clear that there was war, in fact, in Korea when the insured was killed and that he was killed 'in Time of War' ". (R 73 to 83)

It was admitted that the insured while in the military service of the United States met his accidental death in the Territory of Alaska on August 23, 1951. (R 46, Par. 1, 2 and 3)

II.

JURISDICTIONAL STATEMENT

Jurisdiction of the Supreme Court of the United States is invoked pursuant to *Judicial Code Title 28 Sec. 1257*, June 25, 1948, C. 646, 62 Stat. 929, reading in part as follows:

"Final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court as follows:

"(3) By Writ of Certiorari—where any right, title, privilege or immunity is specially set up or claimed under the Constitution—of—the United States."

Respondent defended here on the exclusion clause in the riders providing, "This accidental death benefit shall be void if insured shall be in the military, naval or allied service in time of war at the date of the accident." (R 24, par. 4, R 26, par. 5 and page 26, par. 9) The District Court and Court of Civil Appeals both held, as urged by Petitioner, that his death did not occur "in time of war" (R 29, pars. Second and Third) and that the clause "in time of war" meant and could only mean a constitutionally declared war. R 71, last par.)

The Supreme Court of Texas, although admitting that "It is true that the Constitution by Sec. 9 (8) of Article 1 gives Congress 'Power to declare war' and that Congress has not in so many words by formal act declared war against North Korea or Communist China" (R 74 2nd Par.) nevertheless held "It is clear that there was war in fact in Korea when the insured

was killed and that he was killed 'in time of war' " (R 82 Summary) although killed in Alaska. Thus the Supreme Court held that it was and can be "in time of war" in the United States and its territories against a foreign nation, or nations, without a declaration of war by Congress. This holding is directly contrary to Sec. 8, Article 1 of the *United States Constitution* giving Congress alone the power to declare war.

The Supreme Court of Texas, in reversing and rendering said cause on the sole ground that it was "in time of war" in the absence of a declaration of war by Congress, thus raised a federal question and denied Petitioner a right specifically set up and claimed by her under the Constitution, and which question is intrinsically important not only to Petitioner, but also to the beneficiaries of the many others with like polices who were in the military, naval or allied services of the United States and who met accidental death in the United States or elsewhere during the Korean Conflict, or who mbay hereafter meet accidental death during a similar conflict, when war has not been declared by Congress.

International News Service, Washington, Oct. 12 (53, in commenting on United States Supreme Court denial of Writ of Certiorari in Beley and Harding cases from Supreme Court of Pennsylvania, hereafter cited, stated, "The Court dealt insurance firms a body blow by ruling the Korean Conflict was not 'a war'. Many insurance policies contain clauses which say double indemnity payments are not required when the insured person dies while on military duty 'in time of war' ".

This constitutional question was raised by Petitioner in the trial court (R 29, Par. Second and Third) and was preserved by Petitioner at her first opportunity in her motion for rehearing in the Supreme Court of Texas (R 84), which was overruled by said Court, without comment, on November 11, 1953 (R 104).

The cases believed to sustain such jurisdiction are:

St. Louis & Iron Mountain Ry. vs. Taylor, 210 281 from bottom page 292 to top page 294;

Nutt vs. Knut, 200 U. S. 12, pages 18 and 19;

State of Indiana ex rel Anderson vs. Brand, 303 U. S. 511 (Pages 512 to 516).

Here jurisdiction should also be sustained for the sake of Uniformity of Construction in the various State Courts as to whether "in time of war" means a constitutionally declared war as was held by the Supreme Court of Pennsylvania in

Beley vs. Pennsylvania Mutual Life Ins. Co., 95 Atl. (2d) 202;

Harding vs. Pennsylvania Mutual Life Ins. Co., 95 Atl. (2d) 221;

(Writ of Certiorari denied by United States Supreme Court on October 12, 1953).

under like exclusion clauses in life policies or whether "in time of war" means war "in fact", without a decalaration of war by Congress, as held by the Texas Supreme Court in the instant case, directly contrary to the holding in the Pennsylvania cases. Other cases are

now pending in the various subordinate State Courts and subordinate Federal Courts involving the same question.

It is thought that this Honorable Supreme Court of the United States recognized that the Korean Conflict was not "in time of war" in *Youngstown Steel & Tube Company, et al vs. Sawyer*, 72 Sup. Ct. 863. In case it did not, then the question of whether the Korean Conflict constituted a status of "in time of war" in the United States and Alaska has not previously been decided by this Honorable Court and under Rule 38 (5) (a) of the Supreme Court, Certiorari is permitted.

III.

QUESTIONS PRESENTED

Whether, by reason of the Korean Conflict, absent a declaration of war by Congress, as provided for in Sec. 8, Article 1 of the Constitution, it was "in time of war" in the Territory of Alaska on August 23, 1951, under the terms of an insurance policy issued by a Texas corporation to a Texas citizen.

IV.

REASONS RELIED ON FOR THE ISSUANCE OF WRIT

In reversing and rendering the judgments of the lower courts in favor of your Petitioner on the sole ground that by reason of the Korean Conflict it was "in time of war" on August 23, 1951, when the insured met his accidental death in Alaska, under double indemnity accidental death benefit riders attached to the policies sued on, providing "This accidental death benefit shall be void if the insured shall be in the military, naval or allied services, in time of war, at the date of the accident", the Supreme Court of Texas incorrectly decided a question of law contrary to Sec. 8, Article 1 of the *Constitution of the United States*, giving Congress alone power to declare war, and of grave and intrinsic importance to your Petitioner and to the beneficiaries in like policies of the many others in such services who met accidental death during such conflict, and in and outside of the theatre of operations. (First, Second and Fourth Points of Petitioner's Motion for Rehearing to the Supreme Court of Texas (R 84)).

PRAYER

Wherefore, your Petitioner prays that a writ of Certiorari issue, under the seal of this Court, directed to the Supreme Court of Texas, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Supreme Court of Texas had in the case numbered and entitled on its docket, No. A-4140, *Western Reserve*

Life Insurance Company, Petitioner vs. Jennie Louise Davidson Meadows, Respondent, to the end that this cause may be reviewed and determined by this Court, as provided for by the Acts of Congress of the United States; and that said Judgment of the Supreme Court of Texas be reviewed and reversed by this Court, and for such other relief as this Court may deem proper.

Dated this 10th day of December, 1953.

JENNIE LOUISE DAVIDSON MEADOWS

By John M. Scott

John M. Scott, *Counsel for Petitioner.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS AND JUDGMENTS OF COURTS BELOW

The judgment of the trial court, the District Court of Young County, Texas is shown R 38, 39 & 40.

The judgment of the Court of Civil Appeals is shown R 55 and the opinion of said Court is reported in 256 SW (2d) 674 and is shown R 55, pertinent parts pages 62 to 71.

The judgment of the Supreme Court of Texas is shown R 72 and the opinion of said Court is shown R 73 to 83 and is reported in 261 SW (2d) 554.

Your Petitioner's Motion for Rehearing to the Supreme Court of Texas is shown R 83 to 103 and said Court's order denying said Motion, dated November 11, 1953, is shown R 104.

II.

JURISDICTION

1. The date of the judgment of the Supreme Court of Texas to be reviewed is October 7, 1953 (R 72), Motion for Rehearing was overruled November 11, 1953 (R 104). Thus the time within which to file Certiorari expires February 9, 1954.

2. The statutory provision which is believed to sustain jursidiction of this Court is *Judicial Code Title 28,*

Sec. 1257, June 25, 1948, C 646, 62 Stat. 929, quoted in part at page 3, above.

Jurisdiction is also believed to be sustained under Rule 38 (5) (A) of The Supreme Court, permitting Certiorari as to Federal questions of intrinsic importance, not previously decided by the United States Supreme Court, and also for the sake of uniformity of the decisions of the States Supreme Courts, involving a Federal question and involving the construction of the Constitution of the United States.

3. Here the insured, admittedly a Lieutenant Colonel in the United States Army, (Engineers Corps), met accidental death in Alaska on August 23, 1951. (R 46, pars. 1 and 2)

The Respondent defended on the ground that the insured met his accidental death "in time of war" and urged that the petitioner should be denied recovery for double indemnity under the provision of the riders attached to said policies providing "This accidental death benefit shall be void if the insured shall be in the military, naval or allied services, in time of war, at the date of the accident." (R 24, 25, pars. 4 and 5 and page 26, par. 9)

The District Court and Court of Civil Appeals allowed recovery by Petitioner, said Court of Civil Appeals holding that the exclusion clause "in time of war" did not apply as said term referred to a constitutionally declared war and such a war did not then exist. (R 62 to 71)

The Supreme Court of Texas reversed and rendered the judgments of said lower courts and in so doing

stated, "It is true that the Constitution Sec. 9 (8) of Art. 1 gives Congress 'power to declare war' and that Congress has not, in so many words, by formal act declared war against North Korea or Communist China", (R 74, Par. 2) but nevertheless held "It is clear that there was war in fact in Korea, when the insured was killed and that he was killed 'in time of war'." (R 82 in Summary)

Thus the Supreme Court of Texas held that it can be "in time of war" in the United States and its territories against a foreign nation, absent an invasion or a declaration of war by said foreign nation and absent a declaration of war by Congress. Such holding is directly contrary to and violates the provisions of Sec. 8, Article of the *United States Constitution* and thus denied Petitioner a right set up and claimed by her under the Constitution.

4. The constitutional question was raised by Petitioner in trial court (R 28, pars. Second and Third) and preserved by Petitioner, at her first opportunity, in her Motion for Rehearing to the Supreme Court of Texas. (First Point, Second Point and Fourth Point, said Motion for Rehearing R 84)

5. The cases believed to sustain jurisdiction are cited hereinabove, at page 5. The intrinsic importance of the question to the beneficiaries of those in the military, naval or allied services of the United States who, with like policies, met accidental death during the Korean Conflict, and to those now in, or hereafter to be in the military, naval or allied services of the United States is again stressed. If, as held by the Supreme Court of Texas, "in time of war" does not

require a constitutionally declared war, but can mean war "in fact" far removed from the continental limits of the United States and its Territories, then, as stated by Judge Boyd in the opinion of the Court of Civil Appeals in the instant case, "it may be we shall never know another time of peace" and it may also be that those in such services, with like policies, will never again have any protection, or can know whether they do or do not have protection.

III.

STATEMENT OF THE CASE

The summary statement herein (Page 2) and what has been previously said, we believe gives a clear picture of the matters involved in this proceeding. All the pertinent facts are stipulated (R 45 to 50) or concern matters of which the Courts may take judicial notice. We believe that this Honorable Court can take judicial notice of the concerted efforts on the part of Congress and of the President of the United States to avoid dignifying the Korean Conflict as a war or "in time of war", particularly insofar as it applied within the boundaries of the United States and its Territories. *Youngstown Steel & Tube Company vs. Sawyer*, 343 U. S. 576—Mr. Justice Frankfurter, "No remotely comparable practice can be vouched for executive seizure of property at a time when this country was not at war, in the only Constitutional way in which this country can be at war—In this case, reliance on the powers that flow from declared war has been commendably disclaimed by the Solicitor General."

IV.

SPECIFICATION OF ERROR

The Supreme Court of Texas erred in holding that on August 23, 1951, when the insured met his accidental death, it was, by reason of the Korean Conflict "in time of war" in the Territory of Alaska.

V.

ARGUMENT

If by reason of the Korean Conflict it was "in time of war" on August 23, 1951, in Alaska, when and where the insured met his accidental death, then the judgment of the Supreme Court of Texas is correct. If not, then and there "in time of war" by reason of the fact that Congress had not declared war, said judgment is erroneous and should be reversed.

If "in time of war" in Alaska, then it follows that it was then "in time of war" in all parts of the United States and its Territories as applies not only to all contracts, including insurance policies, containing a war clause, but as applies as well to the increased powers and rights of the Federal Government during "in time of war" and to the limitations and restrictions imposed on the public generally during such time.

It is believed that it is a matter of common knowledge that the President of the United States and also Congress has studiously avoided dignifying the Korean Conflict as a war, or as creating "in time of war". It is believed further that this Honorable Supreme Court and the Solicitor General of the United States refused

to dignify the Korean Conflict as creating "in time of war" in *Youngstown Steel & Tube Company vs. Sawyer* (above).

In any event the holding of the Supreme Court of Texas, in this case, is directly in confiict with

Beley vs. Penn. Mut. Life Ins. Co. Id. (Sup. Ct. of Pa.) 95 Atl. (2d) 202;

Harding vs. Penn. Mut. Life Ins. Co. Id. (Sup. Ct. Pa.) 95 Atl. (2d) 221;

(Writs of Certiorari denied by the Supreme Court of the U. S. on Oct. 12, 1953);

West vs. Palmetto State Life Ins. Co. (Sup. Ct. S.C.) 25 SE (2d) 475-145 A.L.R. 1461.

the two first cases holding the Korean Conflict did not constitute "in time of war" and all holding that it cannot be "in time of war" with a foreign nation until declared by Congress. We have been unable to find one reported case construing the clause, "in time of war" in conflict with the holdings in the above cases, except that of the Supreme Court of Texas in this case.

The holding of the Supreme Court of Texas is also directly contrary to the holding of the Supreme Court of Idaho in *Rosenau vs. Idaho Mutual Life Insurance Company*, 145 Pac. (2d) 227, wherein it held that the United States cannot be "a country at war" with a foreign nation until declared by Congress.

It is elementary that contracts are made and enforced in accordance with the law of the land including the Constitution of the United States, Congressional Acts, etc. and that the laws which subsist at the time

and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. *86 ALR* 1527; *United States ex rel Van Hoffman vs. Quincy*, 4 Wall 535; 12 *Am. Jr.* 769, Sec. 240; 10 *Tex. Jr.* 316, Sec. 182.

Here a Texas corporation issued to a Texas citizen in the military service of the United States a contract agreeing to pay double indemnity in case of accidental death but providing that such double indemnity provision should be void should the insured be "in the military, naval or allied services in time of war". In the face of the Constitution of the United States providing that Congress alone has power to declare war, how could it be held that said clause referred to other than a constitutionally declared war? How could the parties have other than a constitionally declared war in mind when they made this contract? If they had in mind war "in fact" in Korea, or war "in fact" in any other foreign nation never declared by Congress, then what did they have in mind as to the extent of the conflict that would create the commencement of "in time of war"? If war "in fact" can be commenced against a foreign nation, without a declaration of Congress, then when it commences, and whether it be "in time of war" becomes a question of fact to decided by a jury, from the admissible evidence introduced. What standard can be fixed by the trial court in admitting evidence to prove or disprove it is "in time of war"? What instruction should be given by the trial court to the jury as to the meaning of the term "in times of war"?

The application of any rule other than a constitutionally declared war will lead to chaos. It will result,

as it has, as being "in time of war" in some States and not "in time of war" in other States.

The beneficiaries of those with like policies, who met accidental death during the Korean Conflict, and those now or hereafter in the military, naval or allied services should have a definite standard to follow to determine when it is "in time of war". The application of a rule other than constitutionally declared war will leave the rights of the contracting parties to be ascertained through the process of mere conjecture or chance and lead to a multiplicity of suits, to avoid which, a standard should be announced by which it can definitely be determined when it is "in time of war" in the United States and its Territories.

As stated by Judge Boyd in the opinion of the Court of Civil Appeals in the instant case:

"We do not believe that this court has the power to declare that a state of war exists between the United States and North Korea, Communist China, Russia, or any other foreign power, and thereby materially affect contractual relations between our citizens, limiting their rights and privileges to those appertaining to a state of society during a time of war, by basing our declaration on some conjectural hypothesis that may be ignored, denied or repudiated in many, if not all, of the other states. We think that this ought to be and is in the exclusive power of the political department of a central government.

"If appellant's contention is to be sustained, we must declare that a state of war has existed between this country and some other nation at least since the hos-

tilities in Korea assumed some proportion—just what proportion we do not know—something this court has neither the power nor the inclination to do, and which the war-declaring and war-making department of the government for nearly three years has consistently refused to do. That under the provisions of our Constitution the many courts in the states, without a definite cirterion or a uniform standard, and proceeding from different premises and hypotheses, are at liberty to render judgments in conformity with the predilections of the individual judges upon whose decisions the rights to an immense property will be made precariously to depend, is a proposition that does not command the assent of our minds. Courts cannot make the law. If they could and did, we would be cursed by a government of men and not of law, a calamity our people have had the inestimable and happy fortune thus far to escape." (R 70 and 71)

CONCLUSION

We respectfully submit that absent a declaration of war by Congress, or absent an invasion of this country or a declaration of war against this country by a foreign nation, it cannot be "in time of war" in the United States and its Territories and that the Supreme Court of the State of Texas erred in its holding herein to the contrary.

Petitioner respectfully prays that this Honorable Court exercise its jurisdiction to grant a Writ of Certiorari to review the judgment of the Supreme Court of the State of Texas, so that justice may be done, and for such other orders and relief as may be appropriate.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1956

No. 572

JENNIE LOUISE DAVIDSON MEADOWS,
Petitioner,

vs.

WESTERN RESERVE LIFE INSURANCE COMPANY,
Respondent.

Brief of Respondent, Western Reserve Life Insurance Company in Opposition to the Petition for Writ of Certiorari

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Supreme Court of the United States

OCTOBER TERM, 1953

No. 572

JENNIE LOUISE DAVIDSON MEADOWS,
Petitioner,

vs.

WESTERN RESERVE LIFE INSURANCE COMPANY,
Respondent.

Brief of Respondent, Western Reserve Life Insurance Company in Opposition to the Petition for Writ of Certiorari

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

I.

Additional Statement

Respondent submits the following additional and corrective statement:

The material facts in this case appear in the opinion of the Supreme Court of Texas (R. 73-83). The opinion of the court is reported in 261 S. W. (2d) 554-560. This suit involves the construction and in-

terpretation of certain words contained in double indemnity or accidental death benefit riders attached to Texas life insurance contracts issued by respondent. In construing the words "in time of war" the Supreme Court of Texas held that the words were used by the parties in their normal and popular sense, as distinguished from a legalistic or technical sense.

The Supreme Court of Texas did not base its opinion on any Federal ground, but rather decided the case on local or state law—that is, that in the construction of a Texas insurance contract the words would be given their usual and popular meaning unless the contract itself clearly indicated that the words were used in their legalistic and technical sense (R. 73, 83, commencing at page 76).

II.

Summary of Argument

1. Certiorari should be denied because no right, title, privilege or immunity specially set up or claimed under the Constitution of the United States has been invaded or infringed upon.

2. Certiorari should be denied because the state decision was based on, and can be sustained on non federal grounds.

3. Certiorari should be denied because if the State Court has decided a federal question of substance, it has decided same in accordance with applicable decisions of this court.

Argument

Point One

Certiorari should be denied because no right, title, privilege or immunity specially set up or claimed under the Constitution of the United States has been invaded or infringed upon.

The Supreme Court of Texas in the instant case interpreted and construed the language of the insurance contract in accordance with the law of Texas, the State of issuance of such contract. Under the laws of the State of Texas, words used in a contract are construed in their normal and popular sense unless it is evident from the scope of the contract that the words were intended to have some other meaning. The contract is so interpreted to ascertain the intention of the parties and to give effect to that intention. When a Texas contract is so construed according to Texas law, no right, title, privilege or immunity set up or claimed under the Constitution of the United States has been invaded or infringed upon.

Point Two

Certiorari should be denied because the state decision was based on, and can be sustained on non federal grounds.

This honorable court has held that contracts of insurance should be interpreted in accordance with the laws of the state of issuance. (*Mutual Life Insurance Company of New York v. Johnson*, 293 U. S. 335;

Ruhlin et al. v. New York Life Ins. Co., 304 U. S. 202; *New York Life Ins. Co. v. Jackson et al.*, 304 U. S. 261; Rosenthal v. New York Life Ins. Co., 304 U. S. 263.)

New York Life Insurance Company v. Bennion by the United States Circuit Court of Appeals for the Tenth Circuit, 158 Fed. 2d 260 (1946), was a suit brought for benefits for the death of the insured who was killed in the bombing of Pearl Harbor before war was declared. The Circuit Court of Appeals in disposing of the contention made by the beneficiary that the word "war" was required to be construed in its legal and technical sense of a war declared by Congress, held that since this was a Virginia contract its construction and effect were governed by Virginia law. The court further held that under Virginia law the words in an insurance contract were construed in their plain, ordinary and popular sense unless it was evident from the general scope and purpose of the contract that the words were intended to have some other meaning. The court held that the word "war" as used in the contract was required to be construed in its practical and realistic sense and that as commonly understood, war with Japan commenced with the bombing of Pearl Harbor and that the insured was killed 'in time of war' as that term was used in the insurance contract. Writ of Certiorari was denied by this court, 331 U. S. 811, and petition for rehearing was denied, 331 U. S. 867.

This Court in *Aschenbrenner v. United States Fidelity*, 292 U. S. 80, held that unless it was obvious that the terms of an insurance policy were intended

to be used in their technical sense they would be given the meaning common speech imports.

The Supreme Court of Texas, in passing on the instant case merely held that the word "war" was used in the contract in its popular sense and that the Korean conflict was a war in fact and as that term is commonly understood.

The exception of liability in the policies sued on in the event of military service in time of war was expressly authorized by Article 4732, Subdivision 3, 1925 Revised Civil Statutes of Texas. The same subdivision has been carried forward in the Insurance Code, Acts of 1951, 52nd Legislature, Chapter 491. The Statute in effect at the time the policies were written, and Section 3 of Article 3.44 of the Insurance Code of 1951, provide for the general coverage and form of policies of life insurance, and it is provided that said policies may contain an exception for violations of the conditions of the policy relating to naval and military services "in time of war."

Subdivision I of Article 10 of the Revised Civil Statutes of Texas provides that in the construction of all Civil Statutes, the ordinary significance should be applied to words except words of art or words connected with a particular trade or subject matter. The Supreme Court of Texas, while expressing the view that the acts of Congress with respect to the Korean conflict amounted to a determination of the existence of war, expressly refrained from basing its decision on this ground and held that the words of the insurance contract should be construed in their normal and popular sense, stating that this was the settled law in Texas and that the Korean conflict was a war in

its normal and popular sense and a war as that term was used in the insurance contracts. (*National Life & Accident Ins. Co. v. Leverett*, 215 S. W. 2d 939; *Lincoln v. Harvey*, 191 S. W. 2d 764; *New York Life Insurance Co. v. Durham*, (U. S. Cir. Ct. App.) 166 Fed. 2d 874; *Kaiser v. Hopkins*, 6 Cal. 2d 537, 58 Pac. 2d 1278; *Darnall v. Day*, 240 Iowa 665, 37 N. W. 2d 277, 280; *Stanberry v. Aetna Life Insurance Company*, 98 Atl. 2d 134; *Weissman v. Metropolitan Life Insurance Co.*, 112 Fed. Supp. 420; also two Courts Martial decisions by the United States Court of Military Appeals on July 3, 1953, *U. S. v. Bancroft* and *U. S. v. Gann & Sommer*, 3 USCMA 3, 12.)

It was stipulated (R. 46) that the insured met his accidental death on August 23, 1951, while in the military service of the United States and in performance of his military duties. The insured met his death not only during the period of the Korean conflict but also before World War II was legally terminated.

If the word "war" is construed and interpreted in a legal and technical sense of a war declared by Congress, such legal and technical state of war would continue until the ratification of a Treaty of Peace or a Proclamation of Peace (*Hamilton v. Kentucky Distilleries and Warehouse Company*, 251 U. S. 146, 40 S. Ct. 106; *Stewart v. Kahn*, 11 Wall. 493, 507.) World War II was not terminated in a legal sense insofar as Germany was concerned, until October 19, 1951. See House Joint Resolution No. 289, being Public Law 181, 82nd Congress, First Session, Chapter 519, and Executive Proclamation No. 2950, reported in 16 Fed. Reg. 10915. The legal state of war between

the United States and Japan was terminated April 28, 1952, by ratification of the Treaty of Peace with Japan and the Proclamation of the President of the Treaty and of the termination of the state of war with Japan. See Executive Proclamation No. 2974 reported in 17 Fed. Reg. 3813.

Point Three

Certiorari should be denied because if the State Court has decided a federal question of substance, it has decided same in accordance with applicable decisions of this court.

The federal question attempted to be raised herein by petitioner is in fact frivolous, unsubstantial and fictitious. It is not necessary to the existence of war or to constitute a time of war that there be a formal declaration of war by Congress, even when the word "war" is used in its legal and technical sense. The *Prize* Cases, 2 Black 635 (1863); *Bas v. Tingy*, 4 Dall. 37, 40 (1800); Borchard, "*When Did the War Begin?*" 47 Columbia Law Review, 742-748.

It is interesting to note that in the first draft of the Constitution presented to the Convention of 1787, Congress was empowered "to make war". Mr. Madison and Mr. Gerry moved to insert 'declare' in lieu of 'make'. According to 11 Annals of Congress 11 (1801) a sharp dispute was precipitated as to whether a formal declaration of war by Congress was necessary to create a legal status of war when the Bey of Tripoli declared war on the United States. President Jefferson was of the opinion that his only

authority was to defend against aggressive action. Alexander Hamilton (Works of Alexander Hamilton, VII, 746 (Hamilton's ed. 1851)) opposed the view taken by Jefferson, stating: "It is the peculiar and exclusive province of Congress, when the nation is at peace to change that state into a state of war; whether from calculations of policy, or from provocations, or injuries received; in other words, it belongs to Congress only to go to War. But when a foreign nation declares or openly and avowedly makes war upon the United States, they are then by the very fact already at war, and any declaration on the part of Congress is nugatory; it is at least unnecessary."

Congress apparently shared Hamilton's view that a formal declaration of war was unnecessary. It enacted a statute which authorized the President to instruct the commanders of armed vessels of the United States to seize and make prize of all vessels, goods and effects belonging to the Bey of Tripoli, and also to cause to be done all such other acts as the state of war would justify. (2 Stat. 129, 130 (1802)). President Lincoln during the Civil War followed Hamilton's line of reasoning and this reasoning was approved by the Supreme Court of the United States in the *Prize* cases. (2 Black 635, 668 (1863)). See Editorial Comment on the war power, Article I, Section 8, contained in 1952 Revised and Annotated Constitution of the United States, Senate Document No. 170, 82nd Congress, Second Session, pp. 281-282.

The Constitution itself does not define war—the power given Congress to "declare" war is merely an expression of a right which is inherent in any sovereign power. *United States v. Curtis Wright Corpo-*

ration, 299 U. S. 304, 316-318. The Constitution itself recognizes that legal war may exist even without the consent of Congress (Article I, Section 10, Clause 3) wherein a State is authorized to engage in war when actually invaded or in such imminent danger as will not admit of delay. The consent or authorization of Congress with respect to war is not required to be in the nature of a formal declaration but may be inferred from circumstances. (*Virginia v. West Virginia*, 11 Wall. 39 (1871)). The concurrence of the war-making power as to the existence of war may be inferred or indicated by the adoption or approval of proceedings for the prosecution of the war. (*Wharton v. Wise*, 153 U. S. 155, 173 (1894); the *Prize* cases, cited above; *Brown v. United States*, 8 Cr. 131, 132, 133.)

The dictionaries, text books and encyclopedias generally define "war" to be a contest carried on by force of arms as in a series of battles or campaigns, hence in general, conflict or active hostility or contention.

War is war, whether it be an aggressive war, a defensive war, a full-scale war, a constitutionally declared war or a nonconstitutionally declared war.

Organized invasion, intervention or reprisal action, if resisted and when resisted by organized forces, brings about a condition and state of war. (The *Prize* cases, 2 Black 635 (1863); *Bas v. Tingy*, 4 Dall. 37, 40 (1800); *Arce v. State*, 202 S. W. 951; *Lincoln v. Harvey*, 191 S. W. 2d 764; *New York Life Insurance Company v. Bennion*, 158 F. 2d 260 (CCA-10, 1946); *Stankus v. New York Life Insurance*

Company, 312 Mass. 366, 44 N. E. 2d 687; Grotius, *Classics of International Law*, Volume 2, Chapter 1, page 33; *Hamilton v. McClaughry*, 136 F. 445; Ronan, "*English and American Courts and Definition of War*," American Journal of International Law, October, 1937, pages 651-656; Borchard, "*When Did the War Begin?*" 47 Columbia Law Review, 742-748.)

When the hostilities are authorized, recognized, concurred in or supported by the war-making power, the hostilities may be classed as a politically or legally determined war. Authorized commencement of hostilities, or authorized organized resistance, is equivalent to a declaration of war and in either event a perfect state of war exists. (*Hamilton v. McClaughry*, cited above; *Brown v. U. S.*, 8 Cr. 110; *Planters Bank v. St. John*, 19 Fed. Cas. No. 11,208; *Dole v. Merchant's Marine Insurance Company*, 51 Me. 465.)

Conclusion and Prayer

It is submitted that the action of the Supreme Court of Texas in holding that it was in time of war as that term was used in the insurance contracts in question, on the date of death of the insured, was properly adjudicated under State Law, and that there was no substantial federal question involved in said case. Respondent says in the alternative that if a federal question was involved and made the basis of the State court's decision, such decision was in accord with the applicable decisions of the Supreme Court of the United States.

Respondent, Western Reserve Life Insurance Company, prays that the petition for Writ of Certiorari to the Supreme Court of Texas be denied.

Respectfully submitted,

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